

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT PERMIT
482, ROBERT E. MACK, JAMES L.
MACK, and JOHN L. and MARY
VLAHOVICH,

Appellants,

v.

KITSAP COUNTY and C. D.
DEFFENBAUGH,

Respondents.

SHB NO. 87-35

FINAL FINDINGS FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter is a request for review of shoreline substantial development permit (SDP) 482 granted by Kitsap County on July 20, 1987, to Carl Deffenbaugh for a pier, ramp, float and boat hoist to be used as a private boat moorage on the west side of Colvos Passage, Puget Sound, in conjunction with a single family residence. Three pre-hearing orders were entered to govern the proceedings, dated February 8, 1988, April 22, 1988 and October 14, 1988.

1 The matter came on for hearing before the Shoreline Hearings
2 Board on October 20, 1988. Present were Judith A. Bendor, Presiding
3 Member, and Harold S. Zimmerman, Nancy Burnett, Robert Schofield and
4 Gordon Crandall, Members. The hearing was held in Port Orchard on
5 October 20, 1988, and in Lacey on October 21, 1988.

6 Appellants, Robert E. Mack, James L. Mack, and John L. and Mary
7 Vlahovich appeared by their attorney Robert E. Mack. Respondent C.D.
8 Deffenbaugh appeared by his attorney Patricia K. Schafer of Gordon,
9 Thomas, Honeywell, Malanca, Peterson & Daheim. Respondent Kitsap
10 County appeared by Deputy Prosecuting Attorney Peter Philley.

11 Prehearing memoranda were submitted and considered. The Board
12 members visited the site of the proposed development on October 20,
13 1988, and heard opening statements. Thereafter, witnesses were sworn
14 and testified; exhibits were admitted and examined. Closing argument
15 was made. From the contentions, testimony and exhibits, the Shoreline
16 Hearings Board makes these

17 FINDINGS OF FACT

18 I

19 C.D. Deffenbaugh (herein "Deffenbaugh") is the owner of a parcel
20 of land on Driftwood Cove, Kitsap County, (which is the major portion
21 of Government Lot 3, Section 14, Township 23 North, Range 2 East WM.,
22 in Kitsap County, Washington). Driftwood Cove is on on the west side
23 of Colvos Passage about two miles south of the Southworth ferry dock.

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1 Deffenbaugh's property contains about 18.5 acres and has 523 feet of
2 frontage on the Cove. The uplands are improved with a single-family
3 residence and garage with an address of 6981 View Park Road Southeast.
4

5 II

6 Robert E. Mack, James L. Mack, and John L. and Mary Vlahovich
7 (herein collectively called "Mack") are the joint owners of a lot on
8 Driftwood Cove. The lot has 49 feet of frontage on the Cove, and is
9 about 175 feet deep. The Mack property is improved with a cabin and
10 is located 382 feet to the north of the Deffenbaugh property.

11 III

12 Driftwood Cove is a rural community of 18 or 19 single-family
13 homes. Wilson Creek empties into the Cove several hundred feet north
14 of the Mack property. There are no piers in Driftwood Cove. The
15 nearest pier to the north is the Southworth ferry dock. The nearest
16 pier to the south is the Larson pier, 660 feet south of Deffenbaugh's
17 property. There are no more than 5 piers on the west side of Colvos
18 Passage from Southworth to Gig Harbor.

19 The area is exposed to strong winds and waves.

20 IV

21 On April 20, 1987, Deffenbaugh applied for a substantial
22 development permit to construct "a 185 foot pier, ramp and float and
23 boat hoist to be used as private boat moorage in conjunction with
24

1 single-family private residence". Kitsap County issued a DNS for the
2 proposal on May 5, 1987 and established a 15 day comment period
3 pursuant to WAC 197-11-340(2). The DNS stated that:

4 This proposal will result in moderate adverse impacts
5 from alteration of the existing shoreline and loss of
6 some intertidal habitat, as well as alteration of both
7 intertidal and subtidal habitat from pier and float
8 construction.

9 V

10 On July 20, 1987, Kitsap County approved SDP 482 with six
11 conditions. Mack's appeal was timely filed and certified to the
12 Shorelines Hearings Board by the Department of Ecology and the
13 attorney general. It became our SHB No. 87-35.

14 VI

15 The Department of Fisheries has issued a hydraulics permit for
16 the project.

17 VII

18 The pier as approved by Kitsap County measures 185 feet in length
19 and ten feet in width. It is supported by pilings at 12 foot
20 intervals. A ramp near the water end of the pier leads to a float
21 10' x 30'. The pier is to be located 100 feet from the south property
22 line of the tidelands abutting Government Lot 3 and at a right angle
23 to the shore. A boat hoist 14 feet in height above the deck of the
24 pier is proposed.

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VIII

Under the Kitsap County Shoreline Management Master Plan (KCSMMP), the uplands of Government Lot 3 are in a Rural Environment. The tidelands are in a shoreline Conservancy Environment. The area seaward of the line of extreme low tide is a shoreline of state-wide significance.

IX

The Mack property is about 800 feet from the proposed pier. The water end of the pier will be diagonally about 820 feet from the Mack property and will be visible from their property.

X

The pier will be visible from some of the residences in Driftwood Cove and not visible from others. With the conditions listed below, Finding of Fact XVII, we find that the pier does not present a significant visual impact to any of the owners in the area.

XI

Wilson Creek is not now an active spawning area for salmon or cutthroat trout. In the past, Indians have placed egg boxes in the river to allow fish to hatch. They no longer do so, as the creek is silted over.

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XII

Driftwood Cove is inhabited by salmon, cutthroat trout and various other fish. Some fish avoid the shadow of a pier, and this may force juvenile fish into deeper water where there may be a greater risk of mortality. In addition, predator fish sometimes use the shade of a pier to hide from their prey.

XIII

Other methods of keeping boats in an area such as Driftwood Cove include mooring buoys, floating docks and what are known as "marine railways", i.e. keeping the boat onshore and moving it out to the water on tracks.

XIV

There is both a commercial and sports fishery in Colvos Passage. We find that the proposed pier will not significantly interfere with either fishery. The pier will not interfere with water skiing or other navigational activities, as there is adequate water area to maneuver around the pier.

XV

The construction of the pier will not have any significant adverse impact upon the habitat of flora and fauna below the pier.

XVI

The property immediately to the north of the Deffenbaugh property is owned by Alfred Stiller. Stiller has agreed to permit Deffenbaugh

1 to share access to the beach on his property. Stiller has a verbal
2 agreement with Deffenbaugh allowing Stiller to use the proposed pier.
3 Stiller does not object to a condition in the permit which precludes
4 Stiller from constructing a separate pier adjacent to his property.
5

6 XVII

7 The following additional conditions would minimize adverse view
8 impact, promote a minimum size and length pier, and promote the public
9 interest:

10 1. The pier shall be appurtenant to Deffenbaugh's 18.5 acre
11 property, and shall be shared with any subsequent owners of the parcel
12 in the event of subdivision.

13 2. Joint use of the pier shall be offered to the Stillers, and
14 Deffenbaugh shall use his best efforts to obtain a recordable
15 agreement with Sillers in joint use of the dock and for access to the
16 pier over Stillers' property. The agreement shall not be personal,
17 but shall bind subsequent owners of each parcel and shall run with the
18 land.

19 3. The pier shall not exceed 175 feet from the existing
20 bulkhead, or shall terminate at a water depth of -4.4 MLLW (mean lower
21 low water), whichever occurs first.

22 4. Deffenbaugh shall install a safety gate across the entrance
23 to the pier to prevent unauthorized entrance by children and adults.
24

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5. A boat shall be placed on the hoist only when, and only so long as necessary for maintenance or repair, or to avoid damage during stormy weather.

XVIII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. From the foregoing Findings of Fact, the Board makes its

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject matter of this proceeding. RDCW 90.58.180. Appellants bear the burden of proof. RCW 90.58.140(7).

II

We review the proposed development for consistency with the Shoreline Management Act (SMA) and the Kitsap Shoreline Management Master Program. RCW 90.58.140(2)(b).

III

The permit system of the SMA is inextricably interrelated with and supplemented by the requirements of the State Environmental Policy Act (SEPA), Chapter 43.21C RCW. Sisley v. San Juan County, 89 Wn.2d 78, 569 P.2d 712 (1977). The Board's function includes review of compliance with the requirements of SEPA.

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IV

Mack argues that the pier development will violate the policies of the Shoreline Management Act relating to shorelines of state-wide significance. About 80 feet of the pier is in such a shoreline. Mack also argues that the Board should deny the permit because the development provides no public benefit.

It may be said that the proposed pier itself will not greatly enhance the public interest. As conditioned, however, some degree of public benefit is gained. Moreover, we have not required a compelling showing in cases of small, private shorelines development. In Dondero v. Mason County, SHB 87-1, we held that:

The Shoreline Management Act does not require that there be a compensating public benefit to offset the private benefits from every development permit which is issued, but simply requires that the public interest be considered in the processing of permits for any shoreline development. Portage Bay--Roanoke Park Community Council v. Shorelines Hearings Board, 92 Wn.2d 1, 593 P.2d 151 (1979). In that case, the Washington Supreme Court upheld a decision by the Shorelines Hearings Board allowing the issuance of a permit for a floating walkway and services facility for eight houseboats.

V

Mack argues that the proposed pier does not conform with the Kitsap County Shoreline Management Master Program (KCSMMP). They point to the fact that the pier will be constructed in a Conservancy Environment, near an estuary (Wilson Creek), and argue that the County prefers floating docks on piers, that boat docking facilities should

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(9)

1 not be located in an environmentally sensitive area, and that those
2 piers that are approved should be of minimum size and length needed to
3 provide the required service.

4 VI

5 The KCSMMP allows piers and floating docks and boat launching
6 ramps in the Urban, Semi-rural, Rural and Conservancy Environments.
7 These are also permitted as shoreline conditional uses in the Natural
8 Environment. See Part 7, Section V. Under the KCSMMP, piers and
9 docks shall project the minimum distance necessary to service the
10 appurtenant vessels and shall not create a hazard to navigation. Id.
11 Individually owned single family residence piers and docks are
12 permitted where it can be shown that a joint use moorage facility is
13 not feasible. Id.

14 VII

15 Under the KCSMMP, a pier is limited the minimum distance
16 necessary, which is under these facts is 175 feet total in length or
17 where a boat will have a four foot draft at -4.4 MLLW, whichever
18 occurs first.

19 No hazard to navigation is foreseen by construction of the pier.
20 We conclude it is feasible and necessary to require joint use of the
21 pier with the Stillers, but not with others, as the combined frontage
22 of their two properties is about 660 feet.

VIII

There is no evidence that construction of the pier will have any adverse effect on the estuary of Wilson Creek. The pier is not in an "environmentally sensitive" area under Kitsap County ordinances.

IX

Mack argues that the application for the substantial development permit was deficient in that it failed to state that a portion of the proposed development would be in a shoreline of state-wide significance.

But as Mack points out, the permit which was issued does identify the shoreline as one of state-wide significance. The application was evaluated under the additional criteria for such shorelines. KCSMMP Part 6. Mack does not contend that appellants were misled by the application omission. Under these circumstances we conclude the omission was a harmless error.

X

In addition, Mack argues that the record fails to show that certain affected agency or tribes were given notice of the DNS issued for the proposal. Mack provides no evidentiary proof in support of the claim that notice was not given.

The DNS issued on May 5, 1987, states that it was issued under WAC 197-711-340(2), and invites comments within 15 days. WAC 167-11-340(2) provides in part that:

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The responsible official shall send the DNS and checklist to agencies with jurisdiction, the Department of Ecology, and affected tribes, and each lead agency's political power is on whose public services would be changed as a result of implementation action of the proposal, and shall give notice under 197-11-510. [. . .]

The burden of proving that such notice was not given is upon Mack, Absent such proof, the Board will presume that the notice was properly given. As a treatise notes:

In the absence of evidence to the contrary, there is a very strong presumption that public offices have properly discharged the duties of their office and performed faithfully those matters with which they are charged. 29 Am. Jur. 2d. Evidence, § 171.

XI

Mack argues that the County has failed to consider the cumulative effect of additional piers in Driftwood Cove and Colvos Passage. In approving any development, the permitting agency must assess the present and planned capacity of an area to accommodate additional developments and their impacts, and must condition a proposal in a manner which allows it to use only its fair share of such capacity. Here there are no other piers in Driftwood Cove, and the area to the north is more shallow than to the south, making additional piers unlikely. Moreover, the pier is conditioned for joint use. The Board concludes that possible cumulative effect of the conditioned pier is within acceptable limits.

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XII

Mack argues that the DNS was erroneous, and based upon inadequate or incorrect information.

The permitting agency is to issue a DNS if it is determined that there will be no probable significant adverse environmental impacts from the proposal. A proposal "significantly" affects the environment when there is a reasonable probability that it will have more than a moderate effect on the quality of the environment. Sisley v. San Juan County, 89 Wn.2d 78, 569 P.2d 712 (1977). This Board reviews the County's DNS under the clearly erroneous standard of review. Newaukum Hill Protective Association v. Lewis County, 19 Wn. App. 162, 574 P.2d 1195 (1978). We conclude that the County's decision to issue a DNS was not clearly erroneous.

XIII

The Board concludes that construction of the proposed pier should be permitted, subject to additional conditions.

XIV

Any Finding of Fact deemed to a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

Substantial Development Permit No. 482 issued by Kitsap County is
AFFIRMED with the additional conditions as recited in Finding of Fact
XVII.

DONE this 2nd day of March, 1989.

SHORELINES HEARINGS BOARD

Gordon F. Crandall
GORDON CRANDALL, Member

Judith A. Bendor
JUDITH A. BENDOR, Presiding

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

Nancy Burnett
NANCY BURNETT, Member

Robert C. Schofield [by 25]
ROBERT C. SCHOFIELD, Member